IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

LPA No. 138 of 2007

Reserved on: 28.11.2007

Date of decision: 27.12.2007.

Pradeep Kumar … Appellant

Versus

State of H.P. and Others … Respondents

Coram :

The Hon'ble Mr. Justice Deepak Gupta, Judge.

The Hon'ble Mr. Justice V.K. Ahuja, Judge.

Whether approved for reporting?[1] Yes.

For the Petitioner: Mr. Sandeep Sharma, Advocate.

For the respondents: Mr. M.S. Chandel, Advocate General with Mr. R.M. Bisht, Deputy Advocate General, for respondent No. 1 to 4.

Mr. Bimal Gupta and Mr. Karan Singh Kanwar, Advocates, for respondent No. 5.

Per V.K. Ahuja, J.:

This is an appeal filed by the appellant against the judgment of the learned Single Judge of this Court dated November 12, 2007 vide which the writ petition filed by present respondent No. 5 Mohan Singh was allowed and the Excise and Taxation Department was directed to make the allotment in his favour.

Briefly stated, the facts of the case are that respondent No. 5 as petitioner filed a petition before this Court alleging that liquor vend for Unit No. 22 was allotted in pursuance of the recommendations

[1]Whether reporters of Local Papers may be allowed to see the judgment? Yes.

of the Selection Committee and it was alleged that appellant (respondent No. 5 Pradeep Kumar before this Court) had obtained the liquor vend No. 22 fraudulently. It was alleged that the applications were invited by respondents No. 1 to 4 for allotment of liquor vends and the petitioner as well as respondent No. 5 applied for allotment of liquor vend. Respondents No. 1 to 4 on the basis of the applications received allotted Unit No. 22 in favour of respondent No. 5. The petitioner alleged that at the time of grant in favour of respondent No. 5, the petitioner raised an objection regarding genuineness of signatures of respondent No. 5 on application form and on special Power of Attorney executed by him. Respondents No. 1 to 4 after receiving objections enquired into the matter and after scrutinizing it was found that respondent No. 5 liquor contractor participated through alleged authorized representative at the time of allotment of liquor vend. On the basis of objections raised, respondents No. 2 to 4 prima facie found that there is a difference in the signatures in the application form and Power of Attorney allegedly issued by respondent No.5 in favour of his authorized representative. Respondent No. 5 was called to the office of respondent No. 4 to enquire into these objections and it was decided to send the said documents purported to be signed by respondent No. 5 as well as admitted signatures of respondent No. 5 to the Government Examiner of Questioned Documents for submitting its report. Respondent No. 2 on 30.3.2007 informed respondent No. 3 that the committee has confirmed that there is a difference in the signatures and accordingly, the approval in favour of respondent No. 5 was kept pending till the report of Government Examiner of Questioned Documents is received. It was also decided that the liquor vend of Unit No. 22 shall be operated through M/s Jaswant Rai and Company

for a period from 1.4.2007 to 30.4.2007. The petitioner again made a representation that allotment of Unit No.22 to the licensee of previous year, namely, Jaswant Rai was contrary to the rules and in case pending receipt of the expert report, the allotment was to be made, it should have been made in favour of petitioner being No. 2 allottee. Petitioner Mohan Singh filed a writ petition and respondent No. 2 vide order dated 21.4.2007 once again decided to allot the said vend in favour of respondent No. 5 subject to receipt of report of expert. The petitioner alleged that he has learnt now that the report of the expert has been received that the signatures on the application form and Power of Attorney executed by respondent No. 5 do not tally with the admitted signatures of respondents No. 5 and thus, respondents No. 1 to 4 were under a duty to reject the allotment and not to grant licence in favour of respondent No. 5 but no action has been taken against respondent No. 5. The petitioner is aggrieved by the act of respondents No. 1 to 4 and had challenged their order dated 21.4.2007 allowing respondent No. 5 to run the liquor vend in question and the action of respondents No. 1 to 4 by not taking any action after receipt of the report of the expert was alleged to be wrong and illegal. Hence, the writ petition filed by the petitioner.

The writ petition was allowed by the learned Single Judge vide his impugned judgment dated 12.11.2007 and respondent No. 2 was directed to make allotment in favour of the petitioner being at Sr. No. 2 of the panel within two weeks from the date of judgment.

Being aggrieved, original respondent No. 5 has filed the present Letter Patent Appeal.

We have heard the learned counsel for the parties and have also gone through the record of the case.

The main question for consideration in the writ petition filed by the present respondent No. 5 was as to whether the petitioner had obtained the allotment in his favour fraudulently and to what extent the fraud was committed by the petitioner in securing the allotment in his favour. This fact was not disputed in the writ petition filed by respondent No. 5 Mohan Singh that the application form submitted by the present appellant bore the signatures of the appellant. The only objection raised by respondent No. 5 was that his signatures allegedly on the Power of Attorney executed by him were not his and as such he had procured the allotment fraudulently. This question has to be considered as to for what purpose the Power of Attorney was executed by the petitioner and as to whether the presence of the petitioner was required or not for which he had allegedly executed a Power of Attorney in favour of one Sandeep Chawla. There is no dispute in regard to the fact that the appellant had applied by filing an application as required by the rules as observed by the learned Single Judge at Page No.5 of the judgment and the fact that this application was duly signed by the appellant was not disputed.

Clause-5 of the Rules provides that the allotment shall be made on the basis of an application and in case of more than one application for a particular unit/vend, the allotment shall be by draw of lot. The draw was to be conducted by a committee and it was provided therein that it shall be made in the presence of the applicant, who wishes to be present on the date of draw. It is for this date that the Power of Attorney was allegedly forged one in favour of Shri Sandeep Chawla who appeared on behalf of the appellant before the selection committee. In case the presence of the appellant was required on that date and the special Power of Attorney allegedly

produced by the said person was forged one, then it could be said that the allotment has been secured by the appellant fraudulently. Therefore, the basic question to be considered by the learned Single Judge was as to whether the presence of the appellant was required under the rules or not at the time the allotment was made by the selection committee. We have already referred to the rules which provides that the applicant may remain present or may not, meaning thereby the presence was not mandatory. In Para 19 of the judgment, the learned Single Judge has observed as under:-

> "The learned Advocate General had further argued that as per notice inviting tender, it was not necessary for the parties to be present at the time of draw of lots as per clause 5 which had already been reproduced above. True it is that presence of applicants was not mandatory at the time of draw of lots, but in the present case, respondent No. 5 had signed the application and his representative on the basis of power of attorney executed in his favour was present on 12th March, 2007 and had participated in the deliberations before the Selection Committee."

Once the presence of the applicant was not required on that date, in case some person had put up appearance on his behalf even on the basis of a forged document, in our view this does not affect the allotment of liquor vend made in favour of the appellant since the presence was not mandatory. Moreover, the applicant had not disputed the signatures on the special Power of Attorney allegedly executed by him and once it was not necessary that the applicant should be present and the applicant has also not disputed the signatures, there was no occasion for respondent No. 2 to seek opinion of the Hand Writing Expert. There was no occasion for the appellant to challenge the said order of respondents No. 1 to 4 to seek the opinion of the said Hand Writing Expert. Once the opinion was received that these signatures do not tally with the one on the application submitted

by the petitioner, the learned Single Judge after referring to various case law came to the conclusion that the allotment in favour of the appellant was liable to be quashed with which conclusion we are not inclined to agree for the reasons given below.

We may reiterate again that once the presence was not necessary before the selection committee, even in case the appellant was represented by the Special Power of Attorney who was not having his signatures, it does not affect the allotment. Moreover, the report of the said expert could not have been relied upon by the learned Single Judge as was done by him for two reasons firstly, that the appellant has not disputed his signatures on the special Power of Attorney. The said opinion of the expert is only an opinion and does not have the presumptive value so as to hold that the said opinion was binding until and unless expert had been examined in the Court, made statement in support of his report and was put to cross-examination by the other party which procedure was not adopted by respondent No. 2. But the learned Single Judge by making detailed reference to the case law or the question that the signatures could be compared by the Court came to the conclusion that relying upon the said report and difference in the signatures, the allotment should be cancelled as made in favour of the appellant which approach of learned Single Judge cannot be said to be correct. There was no occasion for the Court to compare the signatures since the appellant had never denied his signatures on the power of attorney. Even the report could not be accepted as conclusive evidence until and unless the expert had been examined and put to test in cross-examination by the other party and, therefore, the said report was wrongly relied upon by the learned Single Judge in holding that on the basis of said report, the allotment made in favour of the appellant was

liable to be quashed which findings are liable to be set aside. The appeal filed by the appellant is accepted and the order passed by the learned Single Judge directing respondents No. 1 to 4 to make the allotment in favour of respondent No. 5 Mohan Singh is set aside. Appellant shall be permitted to run the legal vend of Unit No. 22 in case the same is not being run by him and the order shall be implemented latest by 31st December, 2007. There is no order as to costs.

CMP No. 969 of 2007:

In view of the judgment passed in the main appeal, this application has become infructuous.

(Deepak Gupta),
Judge.

(V.K. Ahuja),
Judge

December 27, 2007
(BSS)